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Supreme Court of the United States

OCTOBER TERM, 1941

No. 686.

B. KATHRYN WILLIS, as Executrix of the last will and testament of GEORGE S. WILLIS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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No. .

B. KATHRYN WILLIS, as Executrix of the last will and testament of GEORGE S. WILLIS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Eastern District of New York in favor of the defendant, entered upon an order setting aside a verdict in the sum of $36,000.00 in favor of the plaintiff, and directing a verdict for the defendant on the merits, and ordering that judgment be entered for the defendant, and ordering, in the alternative, that a new trial of the issues in this action is granted on the stated ground that the verdict as rendered was contrary to the evidence.

Summary Statement of the Matter Involved

Action was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51 et seq., to recover damages for the death of plaintiff's testator, alleged to have been caused by the negligence of defendant, his employer.

Petitioner contends that decedent's death was caused by the gross negligence of defendant in causing and permitting

its work to be done in an unnecessarily unsafe and dangerous manner, and in accordance with an unsafe and dangerous practice, in that it caused switching operations to be continued, and cars to be switched without warning to and past the point where decedent and two other employees were repairing a switch in defendant's railroad yard, when such danger could have been obviated by merely taking out of use for a short period of time four tracks of the thirty-four tracks in defendant's yard.

Upon the first trial before Judge Galston and a jury, at the close of plaintiff's case, defendant moved for the direction of a verdict in its favor, and said motion was denied. Defendant, without presenting any evidence, thereupon rested its case and renewed the motion. The Court reserved decision on the motion, submitted the case to the jury, and the jury disagreed. Order denying defendant's motion for a directed verdict, and granting a new trial was made and entered on July 5, 1940 (R., pp. 262-263; see memorandum opinion of Galston, D. J., R., pp. 261-262).

The retrial, resulting in a verdict in favor of the plaintiff in the sum of $36,000.00, was had before Judge Byers and a jury. The plaintiff's evidence was the same at both trials, with the exception that at the second trial it was stipulated that the plaintiff's testimony was to the effect that when Willis left the house that morning there was no sign of his being ill or sick or anything of that kind (R., pp. 181, 250)—which Judge Byers characterized as an inconsequential exception (R., p. 237).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

The date of the judgment or decree of the United States Circuit Court of Appeals for the Second Circuit is August 26, 1941 (R., p. 282).

It is submitted that the facts and the law hereinafter set forth in the reasons for the allowance of the writ and in the brief, and the cases therein cited, and which in the interest of brevity are not repeated here, bring the petition herein within the provisions of Rule 38, Paragraph 5, Subdivision (b) of the Rules of this Court.

Opinions of the Courts Below

The opinion of Judge Galston, upon the first trial, is not reported, but appears at pages 261-262 of the record.

The opinion of Judge Byers, upon the second trial, is reported in 35 Fed. Supp. 941 (R., pp. 237-257).

The opinion of the Circuit Court of Appeals for the Second Circuit, Judge Frank, dissenting, dated August 5, 1941, has not yet been reported, but appears at pages 273-281 of the Record.

The Questions Presented

The case presents the following questions:

1. Whether or not the Trial Court and the Circuit Court of Appeals for the Second Circuit erred in holding that plaintiff's testator's death did not result from an inherently dangerous method of doing the work.

This question involves the construction of Section 4, as amended, of the Federal Employers' Liability Act, effective August 11, 1939, fourteen days prior to the death of plaintiff's testator.

2. Whether or not the Trial Court and the Circuit Court of Appeals for the Second Circuit erred in holding that plaintiff's testator's death resulted solely from his own negligence.

Reasons for Allowance of Writ

1. It is submitted that this case presents an important question of federal law which has not been, but should be, settled by this Court.

Section 4, as amended, of the Federal Employers' Liability Act provides that an employee "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier;" (Italics ours).

This constitutes a complete change in the law with reference to assumption of risk, and the petitioner contends that, irrespective of the length of time the alleged custom prevailed in the yard, and irrespective of whether or not Willis was the watchman, the plaintiff is entitled to judgment under this section, as amended.

Prior to the amendment, the plaintiff could not succeed in any action under the Federal Employers' Liability Act in which a negligent and dangerous custom and practice was proved, not because the defendant did not violate its duty to its employees in failing to have the work done by a reasonably safe method, but because, while the plaintiff would be establishing the defendant's causal negligence, he would also be proving the defense of assumption of risk as it then existed.

The question is not only an interesting one but a new one never before decided by this or any other Court, insofar as we have been able to determine, in an action under the Federal Employers' Liability Act, except by the Courts below in the instant case.

The question of law is one of great general importance to injured and the dependents of killed railroad employees and one that will arise time and time again.

If it is ruled upon at this time the Courts will be relieved of their uncertainty and will be able to dispose of the problem regardless of the particular fact situation presented.

The decisions heretofore holding, in cases of this kind, that the plaintiff could not recover were all based on a finding of assumption of risk, and no longer apply.

With the doctrine of assumption of risk abolished, employers should not be permitted to expose their employees

to all sorts of unnecessary risks and dangers and still escape responsibility for their acts. The law certainly should not countenance such social abuses.

2. It is submitted that the decision of the Trial Court and the Circuit Court of Appeals in holding that Willis was the watchman and that, therefore, his own negligence was the sole cause of his death, and in setting aside the verdict in his favor and directing a verdict for the defendant, was in conflict with the applicable decisions of this Court and other Circuit Courts of Appeals on the same matter (*Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580; *Equitable Life Assurance Society of the U. S.* v. *First National Bank of Union Springs*, 40 F. (2d) 817 (C. C. A. 5); *U. S. Fidelity & Guaranty Co.* v. *Wilson*, 52 F. (2d) 66 (C. C. A. 8); *Self* v. *N. Y. Life Ins. Co.*, 56 F. (2d) 364 (C. C. A. 8), certiorari denied, 287 U. S. 607; *White* v. *Bingham*, 25 F. (2d) 837 (C. C. A. 1); *Payne* v. *Haubert*, 277 F. 646 (C. C. A. 6); *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Galvin*, 54 F. (2d) 202 (C. C. A. 6).

3. It is submitted that the Circuit Court of Appeals, in affirming the action of the Trial Court in arbitrarily ordering, in the alternative, a new trial, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit be granted.

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